APPENDIX A

Nos. 99-2257 and 99-3014

IN THE UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

CENTRAL STATES, SOUTHEAST AND SOUTHWEST
AREAS PENSION FUND, AND
HOWARD MCDOUGALL, TRUSTEE,
Plaintiffs-Appellees,

v.

THE KROGER CO.,
Defendant-Appellant.

On Appeal from the United States District Court
for the Northern District of Illinois, Eastern Division
No. 93 C 3669
Honorable John F. Grady, Judge Presiding

BRIEF OF DEFENDANT-APPELLANT

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Dated: September 20, 1999

* * *

G. The District Court Ignored the Final and Binding Step 3 Grievance Committee Decision That Pension Contributions Were Not Required for Atlanta Warehouse Part-Timers, Which Was the Most Compelling Evidence of the Parties' Intent.

For at least 15 years and five CBA terms, from at least 1976 to 1991,[21] Kroger did not make pension contributions to the Fund on behalf of Atlanta warehouse part-timers, with the full knowledge and acquiescence of the Union. During that entire time, Flournoy was responsible for day-to-day administration of the CBA in Atlanta and was also the Union's chief negotiator for the Atlanta Local Supplement, with personal, primary responsibility for preparing the Union's contract proposals. (A0029-0030; PXs 118-120.) Cook was President of the Local and a Trustee of the Fund. (A0019-0020.)

In late 1990, Cook, who had never received a complaint, comment or grievance from anyone at Kroger's Atlanta warehouse regarding non-payment of pension contributions for part-timers, (A0026), was told by Flournoy that steward Scott Chandler believed, after review of the CBA, that the Company was in violation for not making the contributions and that "they were just going to start making them really

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[21] Based on a stipulation entered into by the parties hereto in 1994, more than three years *before* completion of discovery, this Court concluded that "[p]rior to 1977, all newly hired warehouse employees were designated as probationary. In 1977, Kroger changed that designation and classified all newly hired warehouse employees as casuals." 73 F.3d at 729. However, the trial record reveals that some employees hired before 1977 were hired as *part-timers* (PX 131; R. 209—Christopherson 26-28), and others did not have pension contributions made until months after their date of hire *in 1976* (DX 18; PX 72, 143 (Lyons, Harrington, Worthy, Hill).) There is no evidence that Kroger "reclassified" new hires in Atlanta; though many employees prior to 1977 had contributions made approximately 30 days after hire, that could have been because they immediately bid on regular, full-time positions.

abide by this contract." (A0027-0028.) Cook, who was totally uninvolved in the day-to-day administration and negotiation of the Atlanta Local Supplement, had only his interpretation of the CBA to go on (he thought contributions were required), (A0025-0026), but nevertheless took no action, other than to tell Flournoy and Chandler to proceed through the contractual grievance procedure on the matter. (A0027, 0034-0036, 0050.) [22]

The Union's grievance claiming pension contributions for Atlanta part-timers was submitted for final resolution in accordance with the terms of the CBA, was heard under the Committee's Rules, and was denied by the appropriate Committee, consisting of Company representative Horn and International Union Representative Tomes, in March, 1991. (A0030-0035, 0208-0217; R. 23, Exs. X, Z; DXs. 48, 133, 181.)

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[22] Cook did absolutely nothing, after expressing his concern as to "why hasn't somebody brought this to our attention before?", that would support a finding that the Union thought contributions for Atlanta part-timers were required. Thus, he conceded that he did not seize control of the matter from Flournoy. Nor did Cook report to the Fund Trustees that he believed a substantial stream of contributions owed for Atlanta part-timers had slipped through the cracks. (A0036; R. 23, Ex. L.) Nor did Cook have any conversation with the International Union Representative on the Step 3 Committee that heard the grievance, Glen Tomes, (A0034), or prepare any written submission to the Step 3 committee in support of the grievance. (A0035.) Nor did Cook review his negotiation notes for support for his interpretation on the issue. (A0036.) Indeed, Cook relied entirely on Flournoy, who, if one believes Cook's personal interpretation of the CBA, had dropped the ball over all those years, to present the grievance to the Step 3 Committee. (A0034-0035, 0050.) Cook's passive reaction to these events, and his willingness to stay the course with business agent Flournoy in the grievance procedure, raise the strong inference that the status quo, not to pay contributions on Atlanta warehouse part-timers, was in fact the Union's interpretation of the CBA language, or at least was viewed by the Union as a permissible interpretation of it.

The Step 3 Grievance Committee's deliberative process is conclusive evidence of the parties' intent with respect to the terms "part-time," "casual," "probationary," and "regular," because the record is undisputed that the Grievance Committee considered, discussed *and* interpreted every CBA provision at issue. *See*, Statement of Facts, *supra*, 12-13.

The Step 3 Grievance Committee decision is the most relevant extrinsic evidence of the parties' intent and, therefore, deserves special consideration. The District Court's utter disregard for the Committee's ruling, and its scornful treatment of the Committee ruling during closing arguments (A0284-0285), is erroneous as a matter of law. *See Advantage Enterprises*, *supra*, 813 F. Supp. at 597-98 (joint labor-management grievance decision is the "most relevant extrinsic" evidence of the parties' intent regarding pension contributions); *cf.*, *Suburban Teamsters Welfare Fund v. CH Heist Corp.*, 1988 WL 96326 (N.D. Ill., Sept. 8, 1988) (arbitrator's decision probative evidence of parties' intent, as well as an informed opinion on the meaning of the CBA). In the landmark "Steelworkers Trilogy" cases, the U.S. Supreme Court unequivocally stated that "[f]inal adjustment by method agreed upon by the parties is hereby declared to be the desirable method for settlement of grievance disputes arising over the application or interpretation of an existing collective bargaining agreement." *United Steelworkers of America v. American Mfg. Co.*, 363 U.S. 564, 566 (1960); *see also United Steelworkers of America v. Warrier and Gulf Navigation Co.*, 363 U.S. 574, 581 (1960) ("Arbitration is the means of solving the unforeseeable . . . in a way which will generally accord with the variant needs and *desires of the parties*. The processing of disputes through the grievance machinery is actually a *vehicle by which meaning and content are given to the collective bargaining agreement* . . . . The grievance procedure is, in other words, *a part of the continuous collective bargaining process*. It, rather than a strike, is the

terminal point of a disagreement.") (emphasis added). Accordingly, without judicial review of their underlying merits, dispositions of disputes under a CBA's grievance procedure are enforceable whether they are the product of formal arbitration (*United Steelworkers of America v. Enterprise Wheel & Car Corp.*, 363 U.S. 593 (1960)) or final decision by a joint grievance committee. *General Drivers, Warehousemen and Helpers, Local Union No. 89 v. Riss & Company*, 372 U.S. 517 (1963); *Chicago Cartage Co. v. International Brotherhood of Teamsters Local 710, et al.*, 659 F.2d 825 (7th Cir. 1981).

The District Court gave no weight whatsoever to the parties' determination of what their own intent had been over the years on the issue of pension contributions for Atlanta part-timers, as ultimately reflected in the Step 3 Committee decision. Nor did the District Court explain, as this Court requires, why the Step 3 decision, though "derived from the [CBA], viewed in the light of its language, its context, and other indicia of the parties' intention," was "totally unsupported by principles of contract construction and the law of the shop." *Chicago Cartage Co., supra,* 659 F.2d at 827 and cases of this Court cited thereat; *Ludwig Hanold Mfg. Co. v. Fletcher*, 405 F.2d 1123, 1128 (3rd Cir. 1969). Given this Court's holding, as a matter of law, that the CBA is ambiguous, it is axiomatic that the Step 3 Committee's unanimous decision (as would the decision of an impartial arbitrator had it not been unanimous) focused on the parties' intent, consistent with this Court's mandate. *See, Elkouri and Elkouri, How Arbitration Works* at 471 (5th Ed.) (Arbitrator's primary goal in dealing with an ambiguity in a CBA "is to determine and carry out the mutual intent of the parties"). As to the intent of Kroger and the Union in entering into the relevant CBA provisions bearing on this case, pursuant to this Court's mandate, there is no better evidence of the parties' intent than the Step 3 Grievance Committee decision issued pursuant to the CBA's provisions by the parties' handpicked

representatives. Even the Fund's own auditors considered the decision of the joint Step 3 Committee to be a clear reflection of the parties' intent. (DX 39, pp. 10010, 10065, 10068, 100106, 100111.) [23]

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IV. THE FUND CANNOT USE THE SHIELD OF *McCLELLAND* AND *GERBER* TO AVOID THE EXTRINSIC EVIDENCE OF THE PARTIES' MUTUAL INTENT THAT IT NOT RECEIVE CONTRIBUTIONS FOR THE ATLANTA WAREHOUSE PART-TIMERS.

A. *McClelland* and *Gerber* Do Not Apply to this Case.

This Court's prior decision in this case emphasized that: (1) "the Fund is entitled to rely on the terms of the documents to define eligibility for benefits;" (2) the Fund's "right to contributions may not be frustrated by *unilateral* actions of the employer which contravene the terms of the collective bargaining agreement," (emphasis added), citing *Central States, Southeast & Southwest Areas Pension Fund v. McClelland, Inc.*, 23 F.3d 1256, 1258 (7th Cir. 1994); and (3) oral side agreements or collateral defenses by the parties to the CBA cannot trump a pension fund's entitlement to contributions pursuant to CBA and contribution agreement terms, citing *Central States, Southeast & Southwest Areas Pension Fund v. Gerber Truck Service, Inc.*, 870 F.2d 1148, 1149, 1153 (7th Cir. 1989) (*en banc*). 73 F.3d at 733. *McClelland* and *Gerber*, which both involved CBAs that were found *unambiguous*, stand for the general proposition

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[23] The Fund's election to disregard the requirements of its own audit manual, and the opinions of its own auditors with regard to the ambiguity of the contract, notwithstanding the Step 3 grievance decision, (A0057, 0133-0135, 0230-0231, 0233-0234; DXs 40, 44, 45, 50, 51), cannot detract from the importance of the final grievance result as extrinsic evidence of the parties' intent under this Court's mandate.

that the parties to a CBA cannot effectuate a meaning that is contrary to its written terms, or enter into a secret, side agreement not to abide by the written, unambiguous CBA terms, rather than acting exactly as they agreed, in writing, in the CBA. In both *McClelland* and *Gerber*, the parties to the CBAs entered into *unambiguous* written terms broadly requiring pension contributions to the Fund, but then agreed, orally, to limit contributions to much smaller numbers of employees within the broader categorization; in other words, they purported to modify *unambiguous* written agreements with secret side agreements.

This is not that case. Rather, here both parties to the CBA agreed, in writing, ultimately confirmed in contractually-mandated final and binding arbitration, that pension contributions were not owed on Atlanta part-timers. Such mutual agreement under these circumstances, as reflected in the extrinsic evidence, is entitled to enforcement against the Fund's claim, *regardless* of the Fund's knowledge of the extrinsic evidence. This is particularly true here, where the Fund admitted during pretrial discovery that:

> "If Kroger's Atlanta collective bargaining agreements *are ambiguous* [which this Court held they were, 73 F.2d at 733], Central States *concedes* that it cannot make *any* argument based upon its participation rules because *it did not investigate to determine the parties' intent.*" (DX 154 at 2) (Emphasis added.)

The extrinsic evidence in this case is not being used to impermissibly modify an unambiguous CBA, thereby blind-siding the Fund, but is being used properly to interpret ambiguity in the CBA. Given that the CBA was ambiguous, that there was no secret side agreement, that the Fund knew of the ambiguity and was aware of the parties' interpretation of their mutual intent, as reflected, *inter alia*, in the Step 3 Grievance Committee decision, before it nonetheless made its final assessment and instituted the present litigation, (A0057,

0133-0135, 0230-0231, 0233-0234; DXs 40, 44, 45, 50, 51, 154), and the Fund's admission that, in these circumstances, it was obliged to, but did not, investigate to determine the parties' intent, the Fund cannot hide behind *McClelland* and *Gerber*, in order, to obtain contributions here. *See*, *Moriarty v. Svec*, 164 F.3d 323, 331-32 (7th Cir. 1998) ("[u]nlike *Gerber*, this is not a case where the pension plan's expectations are being frustrated by secret side agreements negating previously negotiated CBAs. . . . that both parties agree on the term's interpretation does not automatically make that understanding an impermissible side deal."); *Pabst Brewing Company, Inc. v. Corrao*, 161 F.3d 434, 442 (7th Cir. 1998) ("[A]s we have stressed in cases like [*Gerber*], the written word must prevail over subjective understandings *unless* one of those gaps 'crying out to be filled' exists or the agreement is genuinely ambiguous."); *Central States, Southeast & Southwest Areas Pension Fund v. Central Cartage*, 69 F.3d 1312, 1315 (7th Cir. 1995), *cert. denied*, 517 U.S. 1134 (1996); *Chicago Area International Brotherhood of Teamsters v. Kennicott Bros. Co.*, 1998 WL 122777, 1998 U.S. Dist. LEXIS 3115 at *22 (N.D. Ill., Mar. 13, 1998).

V. THE FUND IS ESTOPPED FROM CLAIMING THAT PENSION CONTRIBUTIONS ARE OWED ON THE EMPLOYEES AT ISSUE.

In its Complaint, Central States alleges as follows, in paragraph 19:

> The audit of the Defendant's records for the period of December 28, 1986 through December 30, 1989 *revealed* that the Defendant breached the provisions of ERISA, the collective bargaining agreements, the Participation Agreement and the Pension Fund Trust Agreement *by failing to accurately report employee work history and pay all contributions* (and interest due

thereon) to the Pension Fund for the period of December 28, 1986 through December 30, 1989.

(Emphasis added). As the evidence established, however, this is simply not a true statement, first, because Kroger *did* accurately report its employees' work history and pay all contributions due, and second, because any lack of reporting was not "*revealed*" or "*discovered*" in the audit. Rather, the audit "revealed" only that the Fund had simply failed to look at the work histories Kroger sent in every month, and had failed to read the ambiguous CBAs when they were routinely sent in pursuant to the Trust Agreement, or to pursue the ambiguity once it became readily apparent to the Fund, before and during the audit. (A0055, 0056, 0131-0132, 0198-0199.) Kroger had been providing the Fund with information reflecting this supposed "discovery" for years before the audit.

Because the Fund knew all along that no contributions were paid on the employees at issue, and because the Fund repeatedly and continuously represented to Kroger that this non-payment was acceptable, the Fund is estopped from changing its position at this late date. Kroger established each element of this estoppel, *i.e.*; (1) a knowing misrepresentation; (2) made in writing; (3) with reasonable reliance on that misrepresentation; (4) to its detriment. *Coker v. Trans World Airlines, Inc.*, 165 F.3d 579, 585 (7th Cir. Jan. 15, 1999).[24]

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[24] Significantly, the same facts that support estoppel establish the non-existence of any purported "secret side agreement" between Kroger and the Union. Furthermore, the information Kroger provided to the Fund (including the ambiguous CBAs) precludes the Fund from prevailing in the event this Court finds there was no meeting of the minds between Kroger and the Union on any key provision.

A. The Fund's Knowing, Written Misrepresentations

The Fund made two knowing, written misrepresentations to Kroger.

1. The Monthly Bill

The Fund sent Kroger a bill each month based on the information submitted by Kroger the previous month, without relevant objection or exceptions, thereby misrepresenting to Kroger that Kroger's payment and reporting was acceptable. (A0206-0207; DX 118, 122.) Kroger's monthly reporting regularly showed a significant gap between an employee's date of hire and the date contributions began, and that contributions began when a person was added to the regular seniority list, not when the person was hired. (Statement of Facts, *supra*, 14-15.)

The Fund's misrepresentation that Kroger's monthly reporting was acceptable was caused by the Fund's decision to *disregard* the Mark IV reports which Kroger sent to the Fund each month, which revealed the gap between the employee's date of hire and the date contributions began. (DX 153 at p. 2; A0205-0206.) To knowingly disregard a document, filed in the normal course of reporting work histories, month after month, year after year, is an intentional act, far surpassing the "bureaucratic sloppiness" excused in *Coker*, 165 F.3d at 586. Kroger had no way of knowing that the Fund was disregarding a key portion of the information it sent in every month, or that the Fund had any concern about CBA ambiguity, or its contribution practices. Indeed, the Fund not only accepted the contributions but further indicated that the previous months' reporting was *acceptable*, by sending a bill for the next month incorporating precisely the changes indicated in the Form 206, without regard to the gap/delay in contributions reflected in Kroger's submissions.

APPENDIX B

IN THE UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

No. 93 C 3669

CENTRAL STATES, SOUTHEAST AND
SOUTHWEST AREAS PENSION FUND TRUST,
Plaintiff,

v.

KROGER COMPANY, AN OHIO
CORPORATION,
Defendant.

Chicago, Illinois
December 21, 1998
2:00 p.m.

TRANSCRIPT OF PROCEEDINGS
BEFORE THE HONORABLE JOHN F. GRADY
VOLUME 8-B

THE COURT: All right. Thank you, Mr. Madoff.

Let me address those concerns before I give you the findings that I referred to a moment ago.

It is true that the phrase short-term basis is somewhat vague and is not otherwise defined in the agreement. I also agree that what is referred to when the term basis is used is the intent of Kroger in hiring these people; that is, their status is determined as of the date of hire and not by reference to

what happened after their hire. I suggested that the other day, and I continue to think that that is the appropriate interpretation of that phrase.

Now, the evidence persuades me that the employees in question were hired by Kroger with the hope and the expectation that they would become, each of them, full-time regular employees when an opening occurred. Kroger knew, of course, that there was nothing inevitable about that, but its hope was that the training that would be given to these employees would be utilized by the employees to complete their probationary period successfully and to equip themselves to become full-time employees when the opportunity arose.

The evidence about how these people were referred to in the handbooks and the way they were treated generally in regard to their training and nurture persuades me that they were by no means regarded as people who were likely to be on hand for only a short period of time. On the contrary; it was expected that in the normal course, they would work for a long period of time, both as what was referred to as part-timers, and then eventually as people who achieved regular employment and got on the regular seniority list.

The fact that many or perhaps even most of the new hires during the period in question did not last more than 12 weeks doesn't have very much to do with the definition of casual employees. Regardless of how things turned out in the individual case, Kroger's intention in each and every case was that the employee would survive to become a full-time regular employee. The fact that many of them did not has nothing to do with Kroger's intention at the time they were hired.

Now, having said that, let me tell you what my four findings of fact to date are:

First, the employees in question were not "hired on a short-term basis," nor were they "employed from time to time," as defined in article 2.3 of the master portion of the collective bargaining agreement.

I have already addressed the question of short-term basis. Let me take a moment to state the plain meaning of "employed from time to time." This means people who come and go, people whose employment is interrupted, people who might be absent for long periods of time. This does not refer to people who are on hand continuously to work part-time as needed.

The evidence indicates that the employees in question were available and were considered by Kroger to be available on a continuous basis to work part-time as needed during the peaks and valleys that we have heard so much about. These employees were just as continuous as the peaks and valleys were.

My second finding of fact is based upon the first one. It is that the phrase "part-time" in the local portion of the agreement is not the same as and does not mean "casual" as defined in article 2.3 of the master portion of the agreement.

My third finding of fact is that the local union representatives and the negotiators acquiesced in the treatment of all new hires as "part-timers" not entitled to pension and welfare contributions from at least 1977 through the end of the audit period and beyond. These employees were told by management that they would not be titled to benefit contributions until they had successfully bid for regular employment and had been placed on the regular seniority list. The employees fully understood that.

My fourth finding of fact is that the term "part-time" in the local portion of the agreement was interpreted by the company and the local union representatives as referring to these employees who had not been placed on the regular

seniority list and who, by reason of that fact, would not be eligible for benefit contributions, regardless of the length of time they had been employed by the company.

Now, those are the four findings that I am prepared to make and do make at this time. There might be a more felicitous way to state them, but I am going to ask you to pick them up in your proposed findings to the extent you wish to do so, and if you can improve upon the language and make it conform more closely to the evidence, you have my permission to attempt that, but certainly the substance of what I have said will be my findings on those subjects.

Now, I have not made any findings, as you note, on the question of estoppel or on the ultimate question of liability.

The legal sequences of these findings remain to be seen. It seems doubtful to me that in view of these findings, the decision of this court can be that the two portions of the bargaining agreement can be given a coherent and unified interpretation that will point to a decision in favor of one party of the other. It seems to me, rather, that there is an agreement which, as interpreted by the local representatives of the union and by the company, is marked by an inconsistent view of casual and part-time as between the two portions of the agreement.

However, I leave that to you to address in your submissions if you believe that the two portions of the agreement can be reconciled in terms of the definitions of part-time and casual.

What I would like you to do is to prepare a complete set of factual findings for my consideration which will lead to a decision in your favor.